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No. 85-1652

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

vs.

WAYNE CARL COLEMAN,
CARL J. ISAACS, AND
GEORGE ELDER DUNGEE

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GEORGE ELDER DUNGEE

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QUESTION PRESENTED

Whether this Court should grant review on writ of certiorari when the questions posed by the petitioner were not argued in the court below and are not presented by the decision in this case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 6

I. NO CONTENTION REGARDING ANY "PRESUMPTION OF CORRECTNESS" WAS MADE BY THE STATE IN THE COURT BELOW..... 6

II. BECAUSE OF THE INADEQUACY OF THE STATE COURT FACTFINDING, NO PRESUMPTION OF CORRECTNESS ATTACHED..... 7

III. BECAUSE THE COURT OF APPEALS FOUND MANIFEST ERROR AND THAT ANY FINDINGS WERE NOT SUPPORTED BY THE RECORD, THE ISSUE RAISED BY THE STATEIS NOT PRESENTED IN THIS CASE..... 9

IV. BECAUSE THE COURT OF APPEALS CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING ALL OF THE FACTORS ASSERTED BY THE STATE, THERE IS NO ISSUE AS TO WHAT CONSTITUTES THE TOTALITY OF THE CIRCUMSTANCES..... 11

CONCLUSION..... 12

CERTIFICATE OF SERVICE..... 12

TABLE OF AUTHORITIES

Cases	Page
Adickes v. Kress & Co., 398 U.S. 144 (1970)	7
California v. Taylor, 353 U.S. 553 (1957)	7
Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985)	2, 6, 7, 9
Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983)	7
Irving v. Dowd, 366 U.S. 717 (1961)	7
Isaacs (& Dungee) v. Kemp, 778 F.2d 1482 (11th Cir. 1985)	5
Isaacs (& Dungee) v. Zant, 709 F.2d 634 (11th Cir. 1983).	7
Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)	7, 9
Rideau v. Louisiana, 373 U.S. 726 (1963)	6, 8, 9
United States v. Ortiz, 422 U.S., 891 (1975)	7

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BRIEF IN OPPOSITION FOR RESPONDENT GEORGE ELDER DUNGEE

George Elder Dungee, in response to the Petition for a Writ of Certiorari herein, urges this Court to deny the writ because the questions asserted in the petition are not properly presented in this case.

STATEMENT OF THE CASE

George Elder Dungee was tried and sentenced to death in a small, close-knit, rural Georgia community of just over 2,000 households for the murders of six of its most prominent and respected citizens. From the moment that word of the tragedy reached those living in the community until the start of George Dungee's trial, the entire community became a part of events, discussions, and media coverage unprecedented in Georgia history and in the history of most communities, regardless of size, in this land.

Mr. Dungee was tried by a jury chosen from that community, which had been intimately involved in the response to the loss of

its six citizens and had reached a consensus about guilt and punishment not only before his trial, but before his arrest. One of the jurors who decided Mr. Dungee's fate testified in the District Court below that because of intense interest and widespread knowledge in the community, "everyone" in the community knew that Mr. Dungee and the others accused were guilty and should be "fr[ied]" before trial ever started. Transcript, Nov. 5, 1984 hearing before District Court below, at 187-188, 197.

Seminole County's ranking law enforcement officer, the popularly elected sheriff, was quoted as saying "[t]here's not a doubt in my mind that lynching has crossed the mind of everybody." Coleman v. Kemp, 778 F.2d 1487, 1520, 1527, 1530 (11th Cir. 1985); Appendix to Petition for a Writ of Certiorari [hereinafter "App."] at 149, 167, 172.[1] The sheriff was also quoted extensively in newspapers and magazines read in Seminole County expressing the sentiment:

> If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish. . . . And I don't think that would satisfy me.

778 F.2d at 1501, 1518, 1528, App. at 106, 146, 167, 169.

Another elected official, State Senator Julian Webb, successfully avoided appointment as attorney for any of those accused in the killings, saying "I absolutely cannot in good conscience, both personally and professionally, defend any of the accused." 778 F.2d at 1495, App. at 92.

All eight attorneys initially appointed to defend Mr. Dungee and the others accused of the crimes publicly voiced their opposition to their appointments and indicated they would be seeking

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1. The the Court of Appeals for the Eleventh Circuit summarizes the extensive media coverage as well as word-of-mouth communication which saturated the small rural community in Coleman v. Kemp, 778 F.2d at 1491-1537, App. 83-187. Coleman was published simultaneously with the opinion in this case.

to be removed from the case.[2] Many were vehement. The attorneys were reported as expressing the opinion that the appointment was the "worst thing that ever happened to me professionally", that they would be faced with "a loss of money and friends", and that they would "rather take a whipping" than defend those accused. 778 F.2d at 1504, App. 112, 113. One attorney summarized community sentiment:

> I feel the feeling in Seminole County and this part of Georgia is such that I don't want it. It's not the kind of case I want to get involved in. Right now, I plan to ask to be relieved.

778 F.2d at 1516, App. 141.

It was reported that "none of the eight lawyers named want the job," but they were defending those accused only because "the judge must appoint defenders for the accused, and there are stiff and severe penalties for attorneys who refuse." 778 F.2d at 1494, App. 90. One attorney was quoted as saying, "I've done everything I can to get out of it. It's worse than a dose of Colomel [a laxative] but I have to take it. To refuse would be contempt of court." 778 F.2d at 1522, App. 155 [emphasis added].[3]

As observed by the Court of Appeals, the many public attempts of the lawyers to avoid appointment to the case both "reflect[ed] their assessment of the community atmosphere and

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2. A sampling of the articles in the record demonstrates the public nature of the efforts of counsel to avoid appointment of this case. See, e.g., "Judge Names Attorneys for Alday Suspects, Nobody Wants Job", Albany Herald, May 25, 1973; "Blakely Lawyer Also Protests Alday Slayings Defense Role", Albany Herald, May 26, 1973; "Donalsonville Lawyer Believes Judge Will Uphold His Excuse", Albany Herald, May 29, 1973; "Webb Appointed But Desires Off", Dothan Eagle, May 25, 1973; "Alday Slay Suspect Lawyers Want Out," Atlanta Journal, May 25, 1973.

3. The lawyers who defended George Dungee made it clear to the jury that they were appointed to defend him. In his only reference to Mr. Dungee during closing argument at the sentencing phase, the lawyer said: "You have got a little ole nigger man over here that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer . . . . He is ignorant. I will venture to say he has an IQ of not over 80." Transcript of Opening and Closing Arguments at 39.

aggravat[ed] same." 778 F.2d at 1539, App. 190.

In contrast to the unwillingness of any lawyer in the community to defend the accused, the surviving members of the Alday family retained a prominent, popular political leader, former Lt. Governor of Georgia Peter Zack Geer, the nephew of the trial judge, W. I. Geer, to prosecute the case before his uncle. Another prominent lawyer, Alto Lee, volunteered his services and assisted former Lt. Governor Geer in prosecuting the case.

The community's prejudgment of guilt and punishment was reinforced by the highly publicized trial and sentence of death of Mr. Dungee's co-indictee, Carl J. Isaacs, only days before Mr. Dungee's trial. At least one of Mr. Dungee's jurors, Thelma Butler Harrington, attended the trial of Carl Isaacs. Tr. Nov. 5, 1984 hearing at 190-195. Mrs. Harrington testified that the verdict in the Isaacs case was transmitted throughout the community "like chaff in the wind." Id. at 195. "Radio, television, mouth-to-mouth and friend-to-friend. Everybody was talking about it." Id. It was "widely reported that [the Alday] family members were pleased with the death sentenced returned in Carl Isaacs' case." 778 F.2d at 1539, App. 191.

Mrs. Harrington also testified in the District Court below that everyone in the community had decided that the accused were guilty and wanted the death penalty before trial:

> Q. What did [people] say?
>
> A. Fry 'em, electrocute 'em
>
> Q. What else?
>
> A. That's about all I heard, that what's should be done for 'em.
>
> Q. But that was the community sentiment, fry 'em or electrocute 'em?
>
> A. Everybody felt that, yes.
>
> Q. Everybody?
>
> A. Yes.

Tr. Nov. 5, 1984, at 187-188. This same juror was later examined

by counsel for the State as follows:

> Q. Ms. Harrington, isn't it true that members of the Seminole County and Donalsonville area that you talked to said that the defendants should be electrocuted or fried, as you said, if they were the ones that had committed the crimes?
>
> A. Everybody had that sentiment, I think.
>
> Q. Isn't that with the ones that had committed it though, Ms. Harrington?
>
> A. Yes.
>
> Q. They should not be punished if they had not done the crime though, should they?
>
> A. Well, everybody knew they did it though.

Id. at 197 [emphasis added].

Nevertheless, the trial judge, the uncle of the special prosecutor hired by the family to prosecute the accused and obtain the death penalty, refused to grant a change of venue.

The Court of Appeals below found from its painstaking examination of the totality of the circumstances that "highly prejudicial publicity had saturated and inflamed the community to the extent there was overwhelming prejudice in Seminole County" with regard to both guilt and sentence. Isaacs & Dungee v. Kemp, 778 F.2d 1482, 1484 (11th Cir. 1985), App. at 265. It also found that juror Harrington's attendance at the trial of Carl Isaacs the week before sitting as a juror on George Dungee's trial was "an additional factor in Dungee's case which provides significant support" for a finding of prejudice. 778 F.2d at 1484, App. at 266. Finding that the failure of the trial court to grant a change of venue was manifest error, it ordered habeas corpus relief.

REASONS FOR DENYING THE WRIT

This case does not present any issue worthy of review by this Court. The questions presented by petitioner were not argued in the court below and are not present in this case. Moreover, they are not worthy of review. For the reasons which follow, this case should not be reviewed by this Court.

I. NO CONTENTION REGARDING ANY "PRESUMPTION OF CORRECTNESS" WAS MADE BY THE STATE IN THE COURT BELOW.

The first question asserted by the State in its Petition in this case -- whether the presumption of correctness set out in 28 U.S.C. § 2254(d) affects this Court's decision in Rideau v. Louisiana, 373 U.S. 726 (1963) -- was not presented to or decided by the Court of Appeals below and, therefore, should not be considered by this Court.

In its brief to the Court of Appeals for the Eleventh Circuit, the State asserted that the issue presented by this case was a mixed question of law and fact. Supplemental Brief on Behalf of the Respondent-Appellee [Warden Kemp] By the Attorney General in 11th Cir. No. 85-8202 at 19.[4] In the entire discussion of the venue issue on pages 23-65 of its original brief and pages of 21-66 of its supplemental brief after the remand, the State never asserted that any presumption of correctness attached. The Court of Appeals observed that the State had asserted that the issue was a "mixed question", but found it unnecessary to decide whether the State had waived any argument that the issue was one of "pure fact" which might be entitled to some presumption in light of its application of the "manifest error" standard in deciding the case. Coleman, 778 F.2d at 1538 n. 19; App. at 201, n. 19.

This Court should not decide an issue not urged and briefed

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4. As will be discussed in Section II, this was a correct statement of the standard of review. Any findings made by the state courts would not be entitled to a presumption of correctness because of the inadequacy of the state court fact hearings. 28 U.S.C. 2254(d)(3)(6)(7).

by the State below. United States v. Ortiz, 422 U.S. 891, 898 (1975) (where examination of government's brief indicates it did not raise issue, but asserted contrary position in court of appeals below, Court declines to consider question); see also Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970); California v. Taylor, 353 U.S. 553, 557 n. 2 (1957).

II. BECAUSE OF THE INADEQUACY OF THE STATE COURT FACTFINDING, NO PRESUMPTION OF CORRECTNESS ATTACHED.

The Court of Appeals had previously determined that material facts were not adequately developed in the state courts and remanded the cases involving Mr. Dungee and his coindictees for further development of the record. Coleman v. Zant, 708 F.2d 541, 545-549 (11th Cir. 1983); Isaacs (& Dungee) v. Zant, 709 F.2d 634 (11th Cir. 1983). The Court found that facts "crucial in determining the degree to which the publicity was prejudicial and the saturation thereof" had not been developed. 708 F.2d at 547.

The remand to the District Court confirmed the inadequacy of the state court factfinding and the need for a fully developed record on pretrial publicity and community attitudes. Documentary evidence and the testimony of witnesses presented on remand established the full extent of the media coverage, later summarized in the Coleman opinion, 778 F.2d at 1491-1537, App. 83-187, and the community prejudgment of the case.

For example, because of the inadequacy of the brief, group voir dire,[5] during which only conclusory questions were asked,

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5. Jury selection in Mr. Dungee's case took less than a day and covers only 165 pages of transcript. Trial Tr. at 58-223. Only forty venirepersons were questioned. Only 24 of those were even asked if they knew or had heard anything about the case. Trial Tr. 58-223. The incredibly superficial voir dire here contrasts sharply with voir dire in other cases considered by this Court. In Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), which involved a retrial four years after the crime, ten days of individual sequestered voir dire, were needed covering 1,196 pages of transcript, to select fourteen jurors from 167 venirepersons 81 L.Ed.2d at 851, 856 n. 10. In Irving v. Dowd, 366 U.S. 717 (1961), it took eight days to select fourteen jurors from 430 venirepersons. Patton, 81 L.Ed.2d at 856 n. 10.

the state courts knew nothing about what jurors knew about the case or opinions they had formed.[6] Mrs. Thelma Butler Harrington, who was selected as a juror in the case, and many of the other prospective jurors were never asked what they had seen, heard, read or knew about the case. See Trial Tr. at 175-177. However, as established by her testimony in the District Court below, Mrs. Harrington was thoroughly familiar with the case through word-of-mouth communication and pretrial publicity, had attended the trial of Carl J. Isaacs days before sitting as a juror at Mr. Dungee's, and knew, like "everyone" in the community, that Mr. Dungee was guilty and should be "fr[ied]" before trial ever started. Tr. Nov. 5, 1984 at 187-188, 197.

Thus, any factual findings which may be implied -- no explicit findings were made -- are not entitled to a presumption of correctness by the express terms of 28 U.S.C. § 2254(d) because "material facts were not adequately developed", (d)(3), Mr. Dungee did not receive "a full, fair and adequate hearing", (d)(6), and he was denied "due process of law", (d)(7), by the appointment of unwilling counsel, who referred to him as a little "136-pound nigger man" in closing argument, and by the prosecution of this case by the nephew of the trial judge. Thus, this case does not present any collision between the presumption set forth in 28 U.S.C. § 2254(d) and a determination that pretrial publicity has created an inherently prejudicial atmosphere as in Rideau v. Louisiana, 373 U.S. 726 (1963), as conceived in the State's petition.[7]

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6. The petition for certiorari asserts the Court of Appeals gave "no consideration . . . to the voir dire proceedings . . ." or "totally disregarded the jurors' statements . . . ." Petition at 16. This is simply untrue. The Court considered the voir dire, including its limited value to to its inadequacy. 778 F.2d at 1541-1543, App. at 194-198. As pointed out in note 5, in many instances there was no statement for the Court to consider because the jurors were never asked the critical questions. the presumption of correctness set forth in 28 U.S.C. § 2254(d)

7. The State's argument is flawed in another sense as well. Rideau does not employ a "presumption" in terms of allocating the burden of proof or the weight to be given certain evidence or

[footnote continued on next page]

III. BECAUSE THE COURT OF APPEALS FOUND MANIFEST ERROR AND THAT ANY FINDINGS WERE NOT SUPPORTED BY THE RECORD, THE ISSUE RAISED BY THE STATE IS NOT PRESENTED IN THIS CASE.

Even were the presumption of correctness a factor in this case, it would not change the outcome in light of the "extremely high standard of review" employed by the Court of Appeals in deciding this case. Coleman, 778 F.2d at 1538, App. at 188. The Court of Appeals concluded that "applying the relevant legal standards, be it 'manifest error,' 'fairly supported by the record,' 'clearly erroneous', or independent review of a mixed question of fact and law" the unprecedented evidence established the denial of a fair trial before an impartial jury. 778 F.2d at 1537, App. 188.

Thus, even if there was a presumption of correctness in this case, it would be overcome by the "convincing evidence" presented in the District Court, 28 U.S.C. § 2254 (d), and, if not, would not survive the "fairly supported by the record" and "manifest error" standards applied by the Court. Id.; Patton v. Yount, 467 U.S. 1025, ___, 104 S.Ct. 2885, 2889 n.7, 81 L.Ed.2d 847, 854 n.7 (1984).

[continued from previous page:]

findings. Indeed, Rideau never uses the word "presumption." Instead, the Court found publicity so prejudicial and so pervasive that refusal to change venue was a denial of due process. Because the impact of the publicity rendered the subsequent trial a "hollow formality", this Court found, without review of the voir dire, that the defendant was entitled to a jury drawn from another community. 373 U.S. at 726-728. Similarly, here, as acknowledged in juror Harrington's testimony, everyone in the community knew the suspects were guilty and should be sentenced to death. In this situation, an accused has the right to a jury drawn from another community without the intense, emotional involvement persons in Seminole County had about this case. Because this was the right recognized here, and the denial of that right is supported by an examination of the voir dire and the testimony of jurors, the State's collision between presumptions is largely imaginary.

IV. BECAUSE THE COURT OF APPEALS CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING ALL OF THE FACTORS ASSERTED BY THE STATE, THERE IS NO ISSUE AS TO WHAT CONSTITUTES THE TOTALITY OF THE CIRCUMSTANCES.

Although the Court of Appeals below expressly stated that it reviewed the "totality of the circumstances", the State asserts before this Court that it did not, contending the Court "ignored" the "true totality" or made a "superficial review of the totality of the circumstances." Petition at 18-20. It asks this Court to grant certiorari to decide what constitutes the "true totality." No issue is presented by this contention.

Each factor asserted by the State as part of the totality of the circumstances in its brief to the Court of Appeals was considered at some length by that Court. Supplemental Brief in 11th Cir. No. 85-8202 at 27-28, 37, 52-62; 778 F.2d at 1491-1537, 1540-1543, App. 83-187, 193-197.[8] It asserts those same factors again in its Petition to this Court. Petition at 19. The State has pointed to nothing that was left out of the totality; it is simply dissatisfied with the legal conclusion reached by the Court of Appeals. Thus, it presents no question worthy of review by this Court.

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8. One factor which clearly was not considered by the Court of Appeals was the "small town syndrome", which the State conjures up and then charges the Court with utilizing to assume "that small, rural communities have preconceived notions as to guilt or innocence and/or sentence in widely publicized murder cases . . . ." Petition at 20. No such "syndrome" is ever mentioned by the Court of Appeals, nor is any such assumption ever made in its opinion. The Court discusses at length the particular facts presented by this case, which happens to involve a small community. At no point in this litigation has it been suggested that another small community would react the same way. Only the State has suggested that there is some "syndrome" regarding all small towns.

CONCLUSION

For the foregoing reasons, this Court should deny Warden Kemp's request to grant the writ.

Respectfully submitted,

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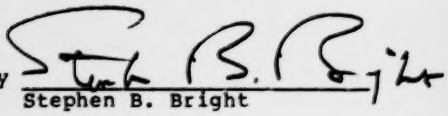
By 
Stephen B. Bright

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Respondent George Elder Dungee was served upon counsel of record for Petitioner, Susan V. Boleyn, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA, 30334, by mailing a copy of each to her, at the foregoing address, by first class United States Mail, this 6th day of May, 1986.

Stephen B. Bright